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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
4-15 August 1997

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION
HELD FROM 4 TO 15 AUGUST 1997

1. At its 52nd meeting, on 4 August 1997, the Preparatory Committee decided to conduct its work through two working groups: the Working Group on Complementarity and Trigger Mechanism (chaired by Mr. Adriaan Bos); and the Working Group on Procedural Matters (chaired by Ms. Silvia Fernández de Gurmendi).

2. At its 53rd meeting, on 15 August 1997, the Preparatory Committee took note of the reports of the Working Group on Complementarity and Trigger Mechanism (annex I) and of the Working Group on Procedural Matters (annex II). The Preparatory Committee also noted that the issues relating to the procedural aspects of article 35 and to the role of the Prosecutor will have to be discussed at a future session.

3. The Preparatory Committee took note that pursuant to paragraph 7 of General Assembly resolution 51/207 of 17 December 1996, the Secretary-General had established a trust fund for the participation of the least developed countries in the work of the Preparatory Committee and in the diplomatic conference of plenipotentiaries. Guidelines have been established for the administration of the Fund. The following Governments have made contributions to the Fund: Belgium, Canada, Denmark, Finland, the Netherlands, Norway and Sweden. Twelve States have utilized the Trust Fund to facilitate their participation in the August session. As at 14 August 1997, a total amount of $300,000 has been received in the Fund. General Assembly resolution 51/207 calls upon States to contribute voluntarily to the Trust Fund.

4. The Preparatory Committee also noted that at the invitation and request of the Government of Italy, Secretariat units responsible for providing services to the proposed diplomatic conference organized a planning mission in June, which made a survey of the facilities intended for the use of the diplomatic conference at the headquarters of the Food and Agriculture Organization of the United Nations in Rome.

Annex I

REPORT OF THE WORKING GROUP ON COMPLEMENTARITY AND TRIGGER MECHANISM*

The Working Group recommends to the Preparatory Committee the texts of the articles shown on the following pages for inclusion in the draft consolidated text of a convention for an international criminal court: articles 21, 21 bis, 21 ter, 22, 23, 24, 25, 25 bis (A/AC.249/1997/WG.3/CRP.1/Rev.1) and article 35 (A/AC.249/1997/WG.3/CRP.2).

* Incorporating the documents listed in the opening paragraph.

Square brackets include also the proposal for total deletion of the text within the square brackets.

If the original International Law Commission text is to be revised, the revision may be as follows:

Article 21

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 20 [(a) to (e) or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 23] [acting under Chapter VII of the Charter];

(b) a complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 25;

[(c) the matter is brought by the Prosecutor, in accordance with article 25 bis.]

[2. [In the case of subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 22 and] [if national jurisdiction is either not available or ineffective] [in accordance with article 35] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

[[1]Article 21 bis

Preconditions to the exercise of jurisdiction

Chapeau of paragraph 1

Option 1[2]

[In the case of article 21, subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following

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[1] This square bracket ends at the end of article 21 bis.

[2] Options are not put in square brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.

State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 20 (a) to (e) or any combination thereof] in accordance with article 22:

Option 2

[In the case of article 21, subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

[(a) the State that has custody of the suspect with respect to the crime ("custodial State")] [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;]

[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) the State of which the victim is a national;]

[(e) the State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].][3]

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.][4]

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

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[3] This paragraph is relevant only to option 2 of the chapeau to paragraph 1.

[4] Ibid.

[[5]Article 21 ter[6]

1. The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

[[7]Article 22

Acceptance of the jurisdiction of the Court

Option 1[8]

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 20, paragraphs [(a) to (d) or any combination thereof].

2. With regard to the crimes referred to in article 20 other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute; or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

3. If under article 21 bis the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to

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[5] This square bracket ends at the end of article 21 ter.

[6] The issues raised in this article deserve further reflection as to its place in the Statute.

[7] The square bracket ends at the end of paragraph 5 of this article.

[8] Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.

the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute.]

Option 2

1. A State Party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 20 (a) to (e) or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 20 (a) to (e)] committed during a particular period of time.[9]

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.[10]

4. If under article 21 bis the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]]

[[11]Article 23

[[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

Paragraph 1

[Notwithstanding article 21, [21 bis] [and 22], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified]

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[9] This paragraph may also apply to option 1.

[10] Ibid.

[11] This square bracket ends at the end of option 2 of paragraph 3.

in article 20 [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

[Paragraph 1 bis

[Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

[Paragraph 1 ter

The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 20 appear to have been committed.]

Paragraph 2

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 20] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

Paragraph 2 bis

[A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 2 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

Paragraph 2 ter

[A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

[[12]Paragraph 3

Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2

1. [Subject to paragraph 2 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]

Article 24

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

Article 25

Complaint by State

Paragraph 1

Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State

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[12] This square bracket ends at the end of paragraph 3 of option 2.

Party [which accepts the jurisdiction of the Court under article 22 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 20, subparagraphs [(a) to (d) or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 22 with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 20 [(a) to (d) or any combination thereof]] appears to have been committed:

(a) a State on the territory of which the act [or omission] in question occurred;

(b) a State of the custody;

(c) a State of the nationality of a suspect;

(d) a State of the nationality of victims.]

[2. A State Party, which, for a crime under article 20, subparagraph (e), has accepted the jurisdiction of the Court pursuant to article 22 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.][13]

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.][14]

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 25.]

[Article 25 bis

Prosecutor

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from

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[13] This provision is without any prejudice to the position of delegations with regard to "treaty crimes".

[14] Further discussion may be necessary in the discussions on procedures. Due regard may be paid to option B on page 110.

any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 20 (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]][15]

* * *

Article 35

Issues of admissibility

The following draft text represents the results of informal consultations on article 35 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

1. [On application of the accused or at the request of [an interested State] [a State which has jurisdiction over the crime] at any time prior to [or at] the commencement of the trial, or of its own motion],[16] the Court shall determine whether a case before it is inadmissible.[17]

2. Having regard to paragraph 3 of the preamble,[18] the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

*[19]

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[15] The procedure to be followed by the Prosecutor in relation to this article may be discussed in the context of procedural questions.

[16] The procedural aspects of the provision have not been fully discussed and have yet to be determined. There are other proposals relating to procedure.

[17] The present text of article 35 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.

[18] Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.

[19] The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint,[20] and a trial by the Court is not permitted under paragraph 2 of article 42;[21]

**[22]

(d) the case is not of sufficient gravity to justify further action by the Court.[23]

3. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

(a) the proceedings[24] were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 20;

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the

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[20] If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.

[21] It was noted that article 35 should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 42, as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 42 to determine whether the reference to article 42 was sufficient or whether additional language was needed in article 35 to address these situations.

[22] Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 55 to be prosecuted before or punished by the Court".

[23] Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.

[24] The term "proceedings" covers both investigations and prosecutions.

circumstances, is inconsistent with an intent to bring the person concerned to justice.

4. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

Annex II

REPORT OF THE WORKING GROUP ON PROCEDURAL MATTERS*

The Working Group recommends to the Preparatory Committee the text of the following articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court:

Article 26.	Investigation of alleged crimes and article 26 bis (A/AC.249/1997/WG.4/CRP.4)
Article 26. Paragraph 6:	(A/AC.249/1997/WG.4/CRP.4/Add.1)
Article 26 ter.	Functions of the Pre-Trial Chamber in relation with investigation (A/AC.249/1997/WG.4/CRP.4/Add.2)
Article 27.	Commencement of prosecution (A/AC.249/1997/WG.4/CRP.6)
Article 30.	Notification of the indictment (A/AC.249/1997/WG.4/CRP.1*)
Article 37.	Trial in presence of the accused (A/AC.249/1997/WG.4/CRP.2*)
Article 38.	Functions and powers of the Trial Chamber (A/AC.249/1997/WG.4/CRP.5)
Article 38 bis.	Proceedings on an admission of guilt (A/AC.249/1997/WG.4/CRP.3 and Corr.1)
Article 40.	Presumption of innocence (A/AC.249/1997/WG.4/CRP.7)
Article 41.	Rights of the accused (A/AC.249/1997/WG.4/CRP.8)
Article 43.	Protection of the [accused], victims and witnesses [and their participation in the proceedings] (A/AC.249/1997/WG.4/CRP.9)

* Incorporating the documents listed in the opening paragraph.

REVISED ABBREVIATED COMPILATION[1]

Article 26

Investigation of alleged crimes

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23, paragraph 1 [**or ex officio upon any other substantiated information**], the Prosecutor shall [**subject to paragraph 1 bis and ter**] initiate an investigation unless the Prosecutor concludes that there is no **reasonable basis** for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency [**Pre-Trial Chamber**].[2]

[**1 bis. Prior to initiating investigation the Prosecutor shall:**

(a) [notify the States Parties of any complaint [or any decision of the Security Council referred to in article 23, paragraph 1], and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission; and]

(b) determine whether:

(i) the complaint provides or is likely to provide a reasonable basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) the case is or would be admissible under article 35; and

[(ii) bis a prosecution under this Statute would be in the interests of justice [taking into account the gravity of the offences and the] [interests of victims];

(iii) [an investigation would be consistent with the terms of any relevant Security Council decision]; and

(iv) to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 34.][3]

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[1] In general, the proposed additions or amendments to the ILC text appear in bold and between square brackets in order to distinguish the new text from the ILC text. The fact that the ILC text does not appear within square brackets does not necessarily mean that it was generally acceptable to all delegations.

[2] Proposed additions originate from the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (Compilation of Proposals) (Official Records of the General Assembly, Fifty-first Session, Supplement No. 22A (A/51/22)), (hereinafter Report), vol. II, p. 112 (item A.1).

[3] Report, vol. II, p. 112.

[1 ter. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged within one month of notification under article 26, paragraph 1 bis (b) (ii), by a State Party that wishes to proceed or has proceeded with the case or by a person named in the submission and awaits the final ruling of the Court.][4]

2. The Prosecutor may:[5]

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence [**documents, records and articles of evidence**];

(c) option 1:

conduct on-site investigations;

(c) option 2:

[(i) Except as provided for in this paragraph, when evidence is in the territory of a State, the Prosecutor shall, as necessary, seek the cooperation of that State in order to obtain that evidence. The Prosecutor may conduct investigations on the territory of a State only:

a. [with the consent of its competent authorities] [upon notification of and where necessary with the consent of its competent authorities] [in accordance with Part 7] [subject to the waiver by the competent authorities of the requirement of consent];

[b. When the Pre-Trial Chamber is satisfied that competent authorities to whom a request for assistance under Part 7 can be transmitted are not available [or not functioning].]

[(ii) In the case of paragraph (i) (b) above, [such investigations] [investigations of a non-compulsory nature[6]] shall be conducted with the [concurrence] [approval] of the Pre-Trial Chamber [which shall

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[4] Report, vol. II, p. 112 (item A.2 (a)). Items A.2 (b) and (c) on p. 112 are addressed in paragraph 1 bis.

[5] It was proposed that the following text be included as the first line of article 26, paragraph 2:

"When evidence is in the territory of a State Party whose competent authority is functioning properly, the Prosecutor shall request, as necessary, the Pre-Trial Chamber to seek the cooperation of a State Party pursuant to Part 7 of this Statute."

[6] This set of square brackets will apply if paragraph (iii) is accepted.

have regard to the views of [interested States]]. [Notification shall be given to the State in question, in particular for the purpose of the State obtaining an extension of the period for execution of a relevant request for judicial assistance.]

[(iii) In the case of paragraph (i) (b) above, the Prosecutor may use compulsory measures for collecting evidence (such as search and seizure and compelling the attendance of witnesses) based upon a valid warrant issued by the Pre-Trial Chamber.]]

(d) take necessary measures to ensure the confidentiality of information or the protection of any person **[, including victims]**;

[(d) bis The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]

(e) as appropriate, seek the cooperation of any State or of the United Nations, **[or of any peacekeeping force that may be present in the territory where an investigation is to be undertaken]**;

[(f) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.]

[(g) enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to secure the cooperation or assistance of a State or person in the investigation.]

3. The Presidency **[Pre-Trial Chamber]** may, at the request of the Prosecutor, issue such subpoenas [**, orders**] and warrants as may be required for the purposes of an investigation, including a warrant under article 28, paragraph 1, for the pre-indictment arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that [a case is inadmissible under article 35 or] there is [**not a sufficient basis for a prosecution**] [**no prima facie case**] under this Statute [or **a prosecution would not be in the interests of justice] [taking into account the interests of victims] and decides not to file an indictment**],[7] the Prosecutor shall so inform the Presidency **[Pre-Trial Chamber]**, as well as the complainant State [or the Security Council, in a case to which article 23, paragraph 1,] applies, giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

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[7] Report, vol. II, p. 115 (item 8).

[4 bis. A decision referred to in paragraph 4 based on considerations of the interests of justice shall only become effective upon its having been confirmed by the Presidency [Pre-Trial Chamber] under paragraph 5 of this article.]

5. At the request of a complainant State or, in a case to which article 23, paragraph 1, applies, at the request of the Security Council, the Presidency **[Pre-Trial Chamber]** shall **[may]** review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision **[but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 4 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the Presidency, [Pre-Trial Chamber] in coming to its decision]**.[8]

[When new information is brought to his/her attention regarding the facts in respect of which he or she decided not to initiate an investigation or not to institute proceedings, the Prosecutor may reconsider his/her decision.]

[5 bis.[9] After a determination to initiate an investigation in accordance with article 26, paragraph 2, and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate an investigation before the Pre-Trial Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.][10]

6. A person suspected of a crime under this Statute shall have the right:

(a) prior to being questioned, to be informed that the person is a suspect **[, of the conduct that the person is alleged to have committed which may constitute a crime under this Statute]** and of the rights under (b) to (d) hereafter;

(b) to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) to have [**at all times**] [**in connection with questioning**] the [**prompt**] [**competent**] legal assistance of the person's choosing; [or, if the person does not have legal assistance, to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the person lacks sufficient means to pay for such assistance];

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[8] Ibid., p. 116 (item C.9).

[9] This paragraph will be discussed in connection with article 34.

[10] Report, vol. II, p. 113 (item 4).

[(d) to be questioned in the presence of counsel unless the suspect has voluntarily waived his or her right to counsel;]

(e) not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat;

(f) if questioned in a language other than [a language the person understands and speaks] [**his or her own language**], to have, free of any cost, the assistance of a competent interpreter and a translation of any document on which the person is to be questioned;

(g) not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

[6 bis.[11] Evidence obtained during questioning in violation of these rights shall under no circumstances be used in the trial unless they are favourable to the suspect.][12]

[7.[13] (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the Rules of the Court, investigate the case by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.][14]

[8.[15] (a) A person suspected of committing a crime within the meaning of this Statute:

(i) shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence that he deems necessary for his defence;

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[11] This paragraph will be discussed in connection with article 44.

[12] Report, vol. II, p. 118 (item 10 (h)).

[13] This paragraph will be discussed in connection with article 12.

[14] Report, vol. II, pp. 113 and 114 (item B).

[15] The Working Group decided to defer the consideration of article 26, paragraph 8, until such time as article 41 is considered.

(ii) may either collect this evidence himself or request the Pre-Trial Chamber of the Court to accomplish certain acts, seeking, where necessary, cooperation from any State Party.

The Pre-Trial Chamber may reject the request.

(b) If the suspect elects to collect the evidence himself in accordance with article 26, paragraph 3 (a), he may apply to the Presidency for the following orders and subpoenas: [list to be inserted]][16]

[Article 26 bis][17]

[(a) In the event that the Prosecutor defers investigation on the ground that a State is proceeding with a national investigation, then the Prosecutor may request that the relevant State make available to the Prosecutor, either periodically or on reasonable request, a report on the progress of its investigation, which shall be confidential to the extent necessary. The Prosecutor shall notify the complainant State of the decision to defer to a State and shall notify the complainant State of any known outcome of such national investigation or prosecution.]

(b) [The Prosecutor shall not initiate an investigation into a case that has been investigated and prosecuted by a State following a deferral by the Prosecutor unless:

(i) the complainant State has lodged a further complaint with the Court on the grounds that the State investigation (or prosecution) has been inadequate, and the Prosecutor agrees;

(ii) following the Prosecutor's notice to the State where the case was prosecuted of the new complaint and of its opportunity to challenge the initiation of an investigation by the Prosecutor, the State where the case was prosecuted has challenged such an investigation by the Prosecutor and either has failed under the Statute to prevent the new investigation or has failed after a reasonable period of time to challenge the initiation of the new investigation; and

(iii) the Prosecutor, upon renewed consideration, has not reached any affirmative determination under article 26, paragraph 1 (b) (i), (ii) or (iii).]

Note: Item A, paragraph 4, on page 113, could be addressed in the context of article 34, which could be expanded to address all challenges, or addressed in article 26.

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[16] Report, vol. II, p. 115 (item C.7).

[17] Ibid., p. 113 (item A.3 (b) and (c)). This article will be discussed in connection with the issues of complementarity and trigger mechanism.

[Article 26 ter][18]

Functions of the Pre-Trial Chamber in relation with investigation[19]

1. [Where the Prosecutor intends to take an investigative action which may] [When the Prosecutor considers an investigation to] present a unique opportunity, which may not be available subsequently for the purposes of a trial, to take testimony or a statement from a witness, or to examine, collect or test evidence, [the Prosecutor shall] [, if the suspect/accused has not been identified or is not available] inform the Pre-Trial Chamber; and] the Pre-Trial Chamber, on the request of the Prosecutor, [or a suspect,] [or on its own initiative,] may take such measures as may be necessary to assure the efficiency and integrity of the proceedings, and in particular to protect the rights of the defence.

2. These measures may include the power:

(a) to make [orders] [recommendations] [orders and recommendations] regarding procedures to be followed;

(b) to direct that a record be made of the proceedings;

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[18] Article 26 ter was tabled by some 15 interested delegations at the August 1997 meeting of the Preparatory Committee. It was written de novo and did not derive from any particular delegation's proposal.

The proposal contemplates that, in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defence.

Some delegations believed that the authority of the Pre-Trial Chamber set out in the proposal should be exercised only to collect and preserve evidence for the defence. In relation to the Prosecutor's investigation, the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct.

The alternative options reflect differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber.

If this proposal is adopted, it seems likely that other proposals in relation to article 26 could be deleted or may need revision. Consideration would need to be given to article 26, paragraph 1, article 26, paragraph 2 (a), (b), (c), (e) and (g), article 26, paragraph 3, article 26, paragraph 4, article 26, paragraph 4 bis, article 26, paragraph 5, article 26, paragraph 5 bis and article 26, paragraph 8.

[19] The powers contemplated by this draft provision include the power for the Pre-Trial Chamber to seek judicial assistance from a State.

(c) to appoint an expert to assist;

(d) to authorize counsel for a suspect to assist, or where suspects have not been identified or have not designated counsel, appoint a lawyer to attend and represent the interest of the defence;

(e) to name one of its members [or an available judge of the Court]:

(i) to observe and make [orders] [recommendations] [orders and recommendations] regarding the collection and preservation of evidence or the questioning of persons;

(ii) to decide on questions of law; or

(iii) to take such other actions as may be necessary to collect or preserve evidence [favourable to the defence] [relevant to the case].

Option: [When in the course of a proceeding a unique opportunity presents itself to collect evidence, the Pre-Trial Chamber may, at the request of the Prosecutor or of the suspect, name one of its members or an available judge of the Court to take necessary measures to collect or preserve evidence, while respecting the rights of the defence.]

3. [If any [order] [recommendation] [order and recommendation] of the Pre-Trial Chamber is breached or is not complied with, the Pre-Trial Chamber may:

(a) reject the admissibility of any evidence obtained as a result or consequence of such a breach or non-compliance; or

(b) consider such breach or non-compliance in respect of whether any weight should be attached to any evidence obtained as a result or consequence of such breach or non-compliance.]

* * *

Article 27

Commencement of prosecution

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 35, concludes that [**the case is admissible, and**] [**a case does exist against one or more persons named,**] [**there is a prima facie case**] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [**which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed**], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant]

[sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the Presidency [Pre-Trial Chamber].[20]

[2. The Presidency [**Pre-Trial Chamber**] shall examine the indictment, any amendment[21] and any supporting material and determine:

(a) whether a prima facie case exists [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence against the accused] with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court [**if the Court has not yet ruled on this issue**].[22]

[**(c) whether it is desirable in the interest of justice that the case should proceed;**][23]

If so, it shall [**by majority/consensus**] confirm the indictment and establish a trial chamber in accordance with article 9 [**, and inform the Presidency**].[24]]

[**2 bis.[25] Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Pre-Trial Chamber on grounds of inconsistency with this Statute.**][26]

[2 ter. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence[27] [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 4 bis. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based.

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[20] Report, vol. II, pp. 120-121 (item 1.A and B).

[21] Ibid., p. 122 (item B.1).

[22] Ibid., p. 121 (item 2 (c)).

[23] Ibid.

[24] Ibid., p. 121 (item 2 and 2 (a)).

[25] China will submit changes to improve the language of this paragraph.

[26] Report, vol. II, p. 121 (item 2).

[27] See article 27, paragraph 1 bis, in the abbreviated compilation (p. 9).

Following the hearing, the Pre-Trial Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment [and amend it], by giving a different qualification to the facts;

[(c) order further investigation];

(d) refuse to confirm the indictment.

When it confirms the indictment in its entirety or in part, the Pre-Trial Chamber shall commit the accused to the Trial Chamber for trial on the indictment as confirmed. Confirmation of indictment shall uphold the warrants issued earlier, except if the Court decides otherwise.]

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency [**Pre-Trial Chamber**] decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

[If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.]

[3 bis. The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.[28]]

[4. The Presidency [**Pre-Trial Chamber**] may [, **on its own or**] at the request of the Prosecutor amend the indictment [, **in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence**] [**after hearing the accused, provided that the Trial Chamber is satisfied that the accused is not prejudiced in his rights to defend himself**].]

[Alternate paragraph 4. Prior to the confirmation of the indictment by the Pre-Trial Chamber, the Prosecutor may amend or withdraw the indictment. [The accused shall be informed of the withdrawal as well as of any amendment. In the event of withdrawal, the Pre-Trial Chamber may, under the provisions provided for in article 26, ask the Prosecutor to reconsider his/her decision.]

After the confirmation of the indictment, the Prosecutor may amend the indictment only with the permission of the Pre-Trial Chamber, and after notice to the accused. If the Prosecutor is seeking to add additional charges or to substitute more serious charges for those in the confirmed indictment, the new or amended charges must be confirmed by the Pre-Trial Chamber in accordance with the procedures for confirmation of the indictment set out in paragraph [...].

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[28] Report, vol. II, p. 122 (item A (iv)).

After the commencement of the trial, the Prosecutor may withdraw the indictment or certain charges within the indictment only with the permission of the Trial Chamber].

[In case of withdrawal of the indictment after the confirmation thereof, new prosecution may be instituted for the same offence only based upon a newly discovered material evidence which was not available to the Prosecutor at the time of the withdrawal in the interest of the defence.]

[4 bis.[29] **When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel.**

When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

[4 ter. Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained.

When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States.

Such provisions shall also apply when the accused has fled or cannot be found.]

5. The Presidency [**Pre-Trial Chamber**] [**Trial Chamber**] may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence [**of the relevant evidence that the defence requests**] within a sufficient time before the trial to enable the preparation of the defence, of [**relevant**] documentary or other evidence available to the Prosecutor [, **whether or not the Prosecutor intends to rely on that evidence**] [**which the Prosecutor intends to rely upon**]; [**if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;**]

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[29] The Working Group decided to defer the consideration of paragraph 4 bis of article 27 for such time as article 37 is considered.

[alternative (b) save in respect of documents or information referred to in article 26, paragraph 2 (f), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused [Quaere: definition of "relevant" for the Rules?]]

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing **[, at the request of either party or a State, or at the instance of the Court on its own volition,]** for the protection of the accused, victims and witnesses and of confidential information;

(e) providing **[, at the request of either party or a State, or at the instance of the Court on its own volition,]** for the protection and privacy of victims and witnesses;

[(f) providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]

* * *

Article 30[10]

Notification of the indictment

1. The Prosecutor **[the Registrar]** shall ensure, where necessary with the cooperation of national authorities, that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person [a language that the accused understands] [in his own language]:

(a)[11] in the case of the pre-indictment arrest of a suspect, a statement of the grounds for the arrest [**[the warrant of arrest or restriction of liberty]**;[12]

(b) in any other case, the confirmed indictment;

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[10] The wording of this article might be modified in the light of the decisions to be taken as regards the question of hearing of the confirmation of an indictment.

[11] Subparagraph 1 (a) will be examined in the context of article 28.

[12] Report, vol. II, p. 146 (item A.1 (a)). Other matters in item A.1 (a) are addressed in article 29, paragraph 2.

(c) a statement of the accused's **[arrested person's]** rights under **[articles 26 or 41 of]** this Statute and the Rules **[, as applicable]**.

[1 bis. An indictment shall be made public, except in the following situations:

(a) The Presidency [Pre-Trial Chamber] may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the Presidency [Pre-Trial Chamber] shall take account of all relevant factors, including the potential for pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public;

(b)[33] **The Presidency [Pre-Trial Chamber] may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]**[34]

2. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, **60**[35] days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency [Pre-Trial Chamber] **[the Registrar]** may **[shall]** on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

[4.][36]

[5. [The accused is] [Anyone suspected of committing a crime within the meaning of this Statute shall be] entitled:

(a) to be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided

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[33] The contents of this subparagraph could become the subject matter of the provision being negotiated on questions of confidentiality, disclosure and protection of information.

[34] Report, vol. II, p. 127.

[35] The matter concerning a specific deadline may be more appropriate for the rules of procedure.

[36] Former paragraph 4 of the abbreviated compilation of proposals on procedural matters (4 August 1997) (hereinafter abbreviated compilation) could become a subject matter for the rules of procedure.

free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed];

(b) [to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel; [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the [Pre-Trial Chamber] of the Court;]

(c) [before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]]

* * *

Article 37

Trial in presence of the accused

Comment: There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft, that appear in the Report, volume II. The ILC text and the proposed options are set out below:

ILC DRAFT

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4.[37] In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Option 1

[Explanatory note: Option 1 prohibits trial in absentia without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial in absentia. Under this option, article 37 would read in its entirety as follows:]

The trial shall not be held if the accused is not present.

Option 2

General rule

1. As a general rule, the accused shall be present during the trial.

Exceptions

2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:

(a) has escaped from lawful custody or has broken bail; or

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[37] The questions addressed in paragraphs 4 and 5 may be better dealt with in the context of the pre-trial proceedings.

[(b) is continuing to disrupt the trial.][38]

Rights of the accused

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, if necessary by a lawyer appointed by the Court.[39]

Proceedings to preserve evidence

[Explanatory note: There is no separate proposal to preserve evidence for trial. This could be dealt with as part of pre-trial proceedings, and would not necessarily be confined to situations where the accused is absent.]

Subsequent trial

[Explanatory note: Under this option, there would be no second trial following a trial in absentia.]

Option 3

1. *Identical to paragraph 1 of the draft of the International Law Commission.*

2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [proprio motu or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

(a) Requests to be excused from appearing for reasons of serious ill-health;

(b) Disrupts the trial;

(c) Does not appear on the day of the hearing;

(d) under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court; or

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[38] Some proponents of option 2 do not agree that this should necessarily be a basis for a trial in absentia.

[39] This provision follows paragraph 3 of the ILC draft, except that it omits subparagraph (a), regarding steps to inform the accused of the charges. This is unnecessary under this option since a trial in absentia is permitted only if the accused was present at the commencement of the trial, a stage at which the indictment is to be read out.

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this paragraph shall be communicated to the accused and may be appealed.

3. ***Identical to paragraph 3 of the draft of the International Law Commission.***

4. When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, [at the request of the Prosecutor] [proprio motu or at the request of one of the parties], order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2. [Paragraph 3 of the ILC draft would remain with consequential amendments.]

* * *

Article 38

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute and the Rules have been respected;

(d) allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber **[and should the accused fail to do so, enter a plea of not guilty on his or her behalf]**.

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[2 bis. The President of the Trial Chamber shall control and direct the hearing, and decide upon the manner by which evidence shall be produced by the parties. In all circumstances, the President shall have the duty to remain impartial.]

3. The Trial Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. The trial shall be held in public, unless the Trial Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence. The deliberations of the Court shall remain confidential.

5. The Trial Chamber shall, subject to this Statute and the Rules, have, inter alia, the power on the application of a party or of its own motion to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(a) bis exercise the same powers as the Pre-Trial Chamber regarding measures that restrict the liberty of a person;

(a) ter terminate or modify any warrants issued by the Pre-Trial Chamber;

(a) quater rule on any preliminary motions, and such ruling shall not be subject to interlocutory appeal except as provided for in the Rules;

(b) require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b) bis order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) rule on the admissibility or relevance of evidence;

(d) protect confidential information; and

(e) maintain order in the course of a hearing.

The provisions of article 27, paragraph 5 (f), will apply mutatis mutandis for the purposes of orders sought under subparagraph (d) above.

5 bis. [The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.]

6. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

* * *

Article 38 bis

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 38, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) the accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) the admission of guilt is [firmly] supported by the facts of the case that are contained in:

(i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and [may] [shall] convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the

admission of guilt not to have been made[40] [and shall [may] remit the case to another Trial Chamber].

5. Discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused, or the penalty to be imposed shall not be legally binding on the Chamber.[41]

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Article 40*

Presumption of innocence[42]

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.[43]

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* Article 40 is also dealt with in the report of the informal working group on general principles of criminal law.

[40] Report, vol. II, p. 178.

[41] Concerns were expressed about this paragraph and it was suggested that its formulation should continue to be examined.

[42] The final provision of the Report, vol. II, p. 194, requiring a finding of guilt by a majority of the Trial Chamber, could be addressed in article 45.

[43] Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt" contained in the ILC text.

Article 41[44]

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled [, **in addition to any rights afforded to a suspect under this Statute,**] to a public hearing, **having regard to [article 38 and] article 43,**[45] and to a fair hearing by an independent and impartial tribunal, and to the following minimum guarantees in full equality:

(a)[46] to be informed promptly and in detail, in a language that the accused understands **[in his own language]**, of the nature, cause and content of the charge;[47]

(b) to have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;[48]

(c) to be tried without undue **[unreasonable]** delay and to enjoy a speedy trial;[49]

(d)[50] subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to

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[44] Various rights to be afforded to persons investigated or indicted by the Court are contained in articles 26, 28, 29, 30 and 41. One issue that arises is whether or not all of these rights should be set forth in one article. Another issue that should be considered is how to categorize which of those rights apply only to suspects, which apply only to the accused and which apply to any suspect or accused appearing in proceedings before a chamber of the Court.

[45] The matters relating to the exceptions concerning a public hearing could be addressed in article 38. The matters in section A on pp. 195 and 196 of the Report, vol. II, could be considered under article 38.

[46] A proposal was made that, as to subparagraphs (a)-(g) of paragraph (1) of article 41 in the abbreviated compilation the wording of subparagraphs (a)-(g) of paragraph (3) of article 14 of the International Covenant on Civil and Political Rights should be used as such.

[47] The matters referred to in section B of p. 196 of the Report, vol. II, are addressed in article 26.

[48] The question of privileged communications could be addressed in the context of article 44.

[49] This addition originates from p. 197 of the Report, vol. II.

[50] Subparagraphs (d)-(g) will have to be re-examined in the light of article 26, paragraph 6.

have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the accused lacks sufficient means to pay for such assistance;[51]

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; [**In addition the accused shall also be entitled to present any other evidence;**][52]

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[**[(h) to make an unsworn statement in his or her defence, if desired] [to declare in his or her defence, but need [shall] not take an oath to speak the truth]**];[53]

[(i) to request the Pre-Trial Chamber or, after the commencement of the trial, the Trial Chamber to seek the cooperation of a State Party pursuant to Part 7 of this Statute to collect evidence for him/her;]

[(j) no reverse onus or duty of rebuttal shall be imposed on the accused.]

2. Exculpatory evidence **[Evidence which shows or tends to show the innocence] [or mitigate the guilt]** of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available **[disclosed]** to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide. **[The provisions of article 27, paragraph 5 (f), will apply mutatis mutandis for the purposes of a decision made under this subparagraph.]**

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[51] These additions originate from pp. 197 and 116 (paragraph d), respectively, of the Report, vol. II. The matters contained in paragraphs 2 and 3 on pp. 197-199 of the compilation could be considered in the development of the Rules.

[52] These additions originate from p. 199 of the Report, vol. II.

[53] These additions originate from pp. 200 and 117 of the Report, vol. II.

[3.[54] The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the Court [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 7 or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]

[4. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.]

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Article 43

Protection of the [accused], victims and witnesses
[and their participation in the proceedings]

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Notwithstanding the principle of public hearings, the Court may order that the proceedings be closed, in the interest of the accused, the victims or the witnesses. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or at the request of a victim of sexual violence.]

2. [The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, whether the crime involves sexual or gender violence. These measures will be consistent with the rights of the accused.]

3. The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence. However, these measures [may not] [shall not] be [inconsistent with] [prejudicial to] the rights of the accused.

4. [The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their

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[54] The rights addressed in paragraphs 3 and 4, which are of a general nature, should perhaps be located in another part of the Statute. In addition, paragraph 4 could be reformulated.

personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.][55]

[5. The Victims and Witnesses Unit, established under article 13 of this Statute, shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights. These measures may extend to family members and others at risk on account of testimony given by such witnesses.][56]

[6. Notwithstanding paragraph 1 of article 27, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

[7. The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.][57]

[8. Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.][58]

9. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

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[55] Some delegations thought that there should be further reflection on the paragraph.

[56] This issue will be addressed in the context of the organization of the Court.

[57] Report, vol. II, p. 204, item A (d).

[58] Report, vol. II., p. 204, item A (b).